

SECOND APPEAL NO. 595 OF 2004

1. Gajanan s/o Sitaram Bhutekar,
Aged about 34 yrs., Occp. Cultivator,
R/o Degaon, Tq. Risod, Distt. Washim
2. Vijay s/o Sitaram Bhutekar,
Aged about 30 yrs., Occp. Cultivator,
R/o Degaon, Tq. Risod, Distt. Washim
3. Sau. Asrabai w/o Bhimrao Junghare,
Aged about 42 yrs., Occp. household
R/o Anehal, Tq. Risod, Distt. Washim
4. Sou. Indubai w/o Subhash Somatkar,
Aged about 36 yrs., Occp. Household,
R/o Mirzapur, Tq. Malegaon,
District Washim
5. Sau. Nandabai w/o Dinkar Davle,
aged about 35 yrs., Occp. Household,
R/o – Utti, Tah. Sangam,
Distt.- Hingoli.

Hanwanta s/o Prabhat Junghare,
aged about 54 yrs., Occp. Cultivator,
R/o Anchal, Tq. Risod,

Distt.- Washim.

:: RESPONDENT
(Original defendant)

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Mr. V. G. Wankhede, Advocate for the appellants.
Mr. A. W. Paunikar, Advocate for the respondent.

CORAM: SMT. V. A. NAIK, J.
DATED: 17TH JULY, 2007.

P. C. :

1. Heard the learned Counsel for the parties. The deceased appellant was the original plaintiff. A suit was filed by the plaintiff for a decree of possession of the suit property and an enquiry under Order 20 rule 12 of the Code of Civil Procedure. It was the case of the plaintiff that she was owner of land gat No. 169. The property was owned and possessed by one Sampat who died on 27/01/1980 leaving behind him one Nimbaji, his son and the plaintiff, his daughter. Nimbaji was unmarried and he died on 12/6/1995 leaving behind him, his only sister Narmadabai, the plaintiff.
2. It was then pleaded by the plaintiff that though there was no partition of the suit property at any point of time, a suit was filed by the defendant against the plaintiff and the daughter seeking permanent injunction restraining the plaintiff and the daughter from disturbing the possession of the defendant over the suit land. In the said suit the defendant was claiming ownership over the suit property on the basis of some document allegedly executed by Nimbaji in his favour. According to the plaintiff the said document did not

confer title on the defendant and the plaintiff was sole the owner of the suit property and was entitled to the possession of the same. It was lastly pleaded that though the defendant had pleaded in Regular Civil Suit No. 57 of 1995, filed by him, that an agreement of sale was executed by deceased Nimbaji in his favour on 14/12/1983, the defendant did not take any steps to get the sale deed executed and the remedy, if any, was barred by the law of limitation. According to the plaintiff, the defendant could not retain possession of the suit field on the basis of document dated 14/12/1983.

3. The defendant resisted the suit of the plaintiff. The defendant, however, pleaded that Nimbaji had executed an agreement of sale on 14/12/1983 and the defendant was in possession of the suit property in pursuance of the aforesaid agreement. According to the defendant, he was all the while ready and willing to perform his part of the contract and to get the sale deed executed. According to him he had every right to retain possession of the property.
4. On the basis of aforesaid pleadings the trial Court framed the necessary issues and after considering the evidence tendered by the parties on record held that the plaintiff had proved that she was the absolute owner of the suit property. The Court further held that the plaintiff failed to prove that the agreement of sale dated 14/12/1983 was a fabricated document and the defendant was illegally possessing the suit property. The Court then held that the defendant proved that deceased Nimbaji had executed an agreement of sale on 14/12/1983 in favour of the defendant and since then the defendant was in lawful

possession of the suit property. The Court held that the suit was not barred by limitation.

5. The findings recorded by the trial Court were upheld by the appellate Court in an appeal preferred by the plaintiff against the judgment passed by the trial Court.
6. The appellate Court considered the fact that a suit for permanent injunction was filed by the defendant against the plaintiff on the basis of an agreement of sale executed in his favour by Nimbaji, but, in spite of the aforesaid fact, the plaintiff did not file a suit for partition of the property. The Courts held that the defendant was entitled to protect his possession under the provisions of Section 53-A of the Transfer of Property Act. Though the Courts held that Nimbaji was not entitled to execute an agreement of sale in respect of the property falling to the share of the plaintiff, the prayer made by the plaintiff was not granted as the plaintiff had not filed the suit for partition and separate possession of the property but had merely filed the suit for possession of the entire suit property though the plaintiff was aware of the fact of execution of the agreement of sale by Nimbaji in favour of the defendant prior to institution of the present civil suit. The Courts, therefore, dismissed the suit of the plaintiff for the aforesaid reasons.
7. At this juncture, Shri Wankhede, the learned Counsel for the appellants makes a request that the appellants may be permitted to withdraw the civil suit as also the first appeal and the second appeal filed by the plaintiffs with liberty to file an appropriate suit for partition and separate possession and also insists that I should record it in my order. The prayer made on behalf of the appellants is totally ill founded and cannot be granted in any

case in its entirety. Though the appellants may be granted permission to withdraw the civil suit and the first and second appeal arising out of the same, this Court cannot grant liberty to the appellants to institute yet another suit as the question of maintainability thereof would be a matter which should be decided by the Court in which the subsequent suit is filed.

8. Since no substantial question of law arises for consideration in this second appeal, the same is dismissed with no order as to costs.

JUDGE